IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 616 of 1989

Smt.Chandrabai Gundu Chavan .. Appellant
(Orig.Deft)

V/s

The Managing Trustee,
Shri Ganpati Panchayatan
Sansthan,Sangli ..Respondent
(Orig.Plff)

Shri Anant i/b Shri S.S.Deshmukh i/b V.A.thorat for the Appellant
Shri Rajesh Patil i/b A.K.Abhyankar for Respondent

CORAM:S.R.SATHE,J.
DATED:27th March 2006

ORAL JUDGMENT> :-

1. The Appellant original defendant in Regular Civil Suit No.166 if 1978 has preferred this appeal against the judgment and order passed by the Court of 3rd Additional Sessions Judge, Sangli whereby the order

passed by the trial Court decreeing the suit for possession in favour of the plaintiff was confirmed and the Appeal No.489 of 1982 was dismissed.

2. For the sake of convenience hereafter the parties shall be referred to as the plaintiff and defendant.

. The brief facts giving rise to this appeal are as under:-

3. The plaintiff is a registered public trust. The suit property, described in para 1 of the plaint is owned by the said trust. Adjoining to the said property there is a room which was initially leased out by the plaintiff to defendant’s husband as he was in service of the plaintiff. It is plaintiff’s case that while residing in the said rented premises the defendant made an encroachment and erected a hut at the adjoining portion of the said room and also created dunk pit at the said place. The defendant also used to keep her cattle at the said place. When plaintiff asked the defendant to remove the said encroachment the defendant refused and on the contrary started claiming right over the suit property. Hence plaintiff filed Regular Civil Suit No.166 of 1978 for possession of encroached portion.

4. The defendant filed her written statement and

contended that the suit property was also leased out to her and she has not made any encroachment thereon. She also contended that her conduct was not causing any nuisance to the plaintiff. She, therefore, prayed for dismissal of the suit.

5. On the pleadings of the parties, the learned trial Judge framed issues at Exh.21.

6. In order to prove the said claim, plaintiff examined their Manager - Yeshwant Shiyekar at Exh.23. After considering the evidence adduced by both the parties the learned trial Judge came to the conclusion that the plaintiff has proved that the defendant has made an encroachment on the plaintiff's property naturally he decreed the suit in favour of the plaintiff and directed the defendant to hand over the possession of encroached portion to plaintiff.

7. Being aggrieved by the said order the defendant filed Regular Civil Appeal No.489 of 1982. after hearing the arguments of both the learned Advocates the learned 3rd Additional District Judge, Sangli came to the conclusion that the defendant has made an encroachment on the plaintiff's property i.e. suit property. Naturally he dismissed the appeal.

8. The original defendant has challenged the above

order in the present second appeal. While admitting the appeal this court (Coram:Kolshe Patil,J) passed the following order :-

Heard learned Counsel for the Appellant.

Substantial question of law mentioned in ground no.1a to 1f are involved.

Admit.

Grounds Nos.1a to 1f reads as under :-

1a) Whether the suit filed by the plaintiff in the present form is maintainable since the defendant is deemed to be a tenant of the entire property;

b) Whether the suit filed by the plaintiff is within limitation;

c) Whether the courts below were correct in putting the burden on the appellant to show that the alleged encroached portion was the part of demise premises;

d) Having regard to the facts that the premises in occupation of the appellant are homogenous and in the absence of any evidence produced by the

plaintiff to show that one room was let to the Defendant, the Courts below correctly held that the Defendant had encroached on the property in suit No.166 of 1978;

e) In view of the fact that the construction was made by the Defendant more than 20 years back on the alleged encroached portion, the suit filed by the plaintiff was within limitation;

f) Whether the Defendants was a tenant of Ghani Chouki i.e. the premises in Suit No.165 of 1978 and No.166 of 1978;

9. In this appeal before me, Shri V.A.Thorat, learned Advocate for the original defendant has urged only two points. Firstly, he submitted that the lower courts have failed to appreciate the evidence on record and have wrongly held that the suit property described in para 1 of the plaint was not part and parcel of the rented property. Secondly, he canvassed before me that the courts below ought to have considered that the defendant had erected hut on the suit property about 20 years back and as such the suit was barred by law of limitation. He, therefore, submitted that the appeal be allowed and decree for possession passed by the courts below be set aside.

10. As against this, the learned Advocate for the Respondent original plaintiff supported the judgment and order passed by the courts below and submitted that the suit property was not the part and parcel of the rented property but the rent property was adjoining to the suit property. Taking advantage of the same the defendants made an encroachment on the suit property. So, plaintiff is entitled to get the possession of the same.

11. It is not in dispute that the suit property is owned by the plaintiff Trust. The plaintiff's witness Shiyekar has categorically stated that the suit property was never leased out to the defendant or her husband but the room adjacent to the said property was leased out to the defendant's husband. It is pertinent to note that the defendant has not adduced even a single document to show that adjacent portion of the leased premises i.e. present suit property was leased out to the defendant. On the contrary, we find that the defendant is not consistent in her stand. At one stage the defendant has contended that the suit property was also leased out to defendant along with the adjacent room while at the other stage it is suggested that the defendant has erected hut on the suit property with permission of the plaintiff. This inconsistent stand itself shows that the suit property must not have bene leased to the defendant but now

defendant wants to retain the possession by hook or crook.

12. The plaintiff's witness Shiyekar has specifically stated that the room adjacent to the suit property was given on lease and the suit property was not at all in possession of the defendant initially. However,in the year 1974 or thereabout the plaintiff noticed the encroachment and thereafter called upon the defendant to remove the same. Incidently it must be noted that though defendant has contended that she has constructed a hut on the suit property no specific evidence is adduced by her to show as to when and how the said hut was erected. What is more to be noted is that the defendant has clearly admitted in her deposition that she had been to the plaintiff for seeking permission for erection of hut but the plaintiff refused the same. This admission of the defendant gives death blow to defendants case. It also shows that the suit property must not have been leased out to the defendant as tried to be contended by her. If it would have been leased out, there was no question of defendant seeking permission for erecting hut. Both the courts below have recorded concurrent finding of fact that the plaintiff has proved that the defendant has made an encroachment on the said property and the plaintiff's suit is in time. There is nothing on record to show that the concurrent

finding of fact is perverse or is against the evidence on record.

13. Under the circumstances there is no necessity to interfere with the said finding in the present Second appeal.

14. In this view of the matter there is no substance in the present appeal.

15. Hence the appeal.

(S.R.SATHE,J.)